



February 7, 2012

**Via Electronic Filing**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth St., S.W.  
Washington, DC 20554

Re: Commercial Availability of Navigation Devices, CS Docket No. 97-80; Compatibility Between Cable Systems and Consumer Electronics Equipment, PP Docket No. 00-67; Adams Cable Request for Waiver, CSR 8537-Z

Dear Ms. Dortch:

This is to notify you that on February 6, 2012, the undersigned had a telephone conversation with Michelle Carey, Nancy Murphy, and Brendan Murray of the Media Bureau with respect to the above entitled matters. In this conversation the undersigned made the following points:

- The waiver filed by Adams Cable Equipment, Inc. (“ACE”) should be denied or at the very least significantly narrowed. ACE calls its waiver “limited” and “conditional” yet it is unlimited in duration and applies to *all* cable operators and *all* equipment, with no pricing guarantees or volume limitations. Any “conditions” are illusory. It is neither limited to “very small cable operators” (as referenced on p.4 of the Petition) nor is it limited to operators facing financial hardship as was the case with Baja. Rather, it would allow *any* operators, including operators not facing financial hardship, to deploy *advanced set top boxes* (including VOD and DVR) and avoid the integration ban.
- The purported consumer benefit -- the waiver states that it would “give consumers the ability to purchase a retail set-top box for as little as \$49” -- appears to be little more than a pretext for ACE to sell refurbished boxes, including *advanced set-top boxes*, to MSOs. See ACE January 25, 2012 ex parte exhibit showing web page offering to sell Motorola HD DVR DCT6416 for \$299. ACE attempts to justify its waiver by providing consumers with additional retail choice yet the waiver is

TiVo Inc. • 2160 Gold Street • Alviso, CA 95002

Tel 408.519.9100 Fax 408.519.5333 • [www.tivo.com](http://www.tivo.com)

*not* limited to providing refurbished set top boxes for retail purchase.

- It is unlikely that more than a handful of consumers have or will purchase refurbished set-top boxes. ACE does not disclose how many consumers have purchased set-top boxes from ACE under the Baja waiver. All the record reflects is that “ACE had a slow start selling directly to Baja’s customers.” Without additional information on actual sales, the Commission cannot give any credence to statements about this waiver advancing Commission policy concerning providing retail options to consumers.<sup>1</sup> In fact, ACE makes no representations about having any retail operation whatsoever other than a web site.
- Indeed, when viewed in contrast with the integration ban-compliant TiVo Premiere HD DVR that is currently sold for only \$99, it strongly suggests that sales to consumers at “retail” is *not* the reason that ACE seeks this waiver.<sup>2</sup> Instead, it appears that ACE wants to be able to sell advanced set-top boxes directly *to MSOs* without separable security (and without any meaningful limitations).
- The Commission has granted a previous waiver to Baja Broadband (CSR-7111-Z) based on non-speculative, extraordinary financial hardship.<sup>3</sup> The ACE waiver

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<sup>1</sup> See *Baja Broadband Operating Company, LLC’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CSR-711-Z, Memorandum Opinion and Order, DA 10-373, at para. 13, n. 51 (rel. March 4, 2010) (“*Baja Order*”) (“If, after, one year, Baja believes that a further extension is warranted, Baja may file updated financial and other information for review (*including the number of subscriber-purchased devices it has activated during this period*) and request an extension.” (emphasis added))

<sup>2</sup> ACE’s February 3, 2012 ex parte again seeks to justify the waiver based *solely* on retail sales (“consumers would benefit from the first-ever retail availability of low-cost set-top boxes. The retail availability of such devices was surely Congress’ original intent for Section 629, yet CEA’s members have never offered such devices to the public. The Commission should not let CEA now stand in the way of the creation of that market”) (“[ACE] would do something in a matter of weeks that it [sic.] that no CEA member has done – make low-cost set-top boxes available at retail to consumers who have never been able to purchase them before”). ACE can’t justify a waiver to sell non-compliant set-top boxes *to operators* based on hand waving about consumer benefits at retail. If ACE wants a waiver to “create a market” at retail, then it should narrowly tailor its waiver request to retail and its merits can be evaluated in that context. ACE cannot use the pretext of retail competition to justify a waiver that is really about (non-retail) sales to operators.

<sup>3</sup> *Baja Order at para. 15* (“we conclude that Baja has demonstrated good cause for waiver based on its financial hardship as well as its commitment to purchase devices from companies that will also offer those devices for sale directly to Baja’s subscribers.”)

attempts to broaden the Baja waiver but *eliminate the primary basis for the waiver – financial hardship*. Such a waiver would absolutely chip away at the integration ban by allowing the deployment of *advanced set top boxes* with integrated security by *any* operator in contravention of the integration ban and Section 629. Apart from the mere fact that pre-2007 non-compliant boxes exist, ACE has offered no compelling reason for the Commission to allow ACE to offer operators large and small the ability to purchase non-compliant set-top boxes. There certainly wouldn't be any innovation benefit as these non-compliant boxes would have 5 year old technology at best. The Commission must have good cause to waive the integration ban. ACE's overbroad and unsupported petition falls short of the standard for a waiver.

- The undersigned also provided a perspective on NCTA's recent CableCARD deployment and support report. TiVo has gained tens of thousands of net retail CableCARD subscribers over the past reporting period. Yet, the NCTA report shows a net decrease in CableCARDS used in retail devices.

#### NCTA CableCARD Statistics

MSO	6/30/2011	12/31/2011	Change
Cablevision	25,085	27,472	2,387
Charter	31,366	31,884	518
Comcast	363,318	329,111	(34,207)
Cox	48,723	52,479	3,756
TWC	75,220	75,542	322
<b>TOTAL</b>	<b>543,712</b>	<b>516,488</b>	<b>(27,224)</b>

- If it wasn't for Comcast there would have been a net gain in CableCARD subscribers for the past 6 months. The reason for this dramatic change in Comcast's numbers is unknown -- perhaps Comcast changed how it counts CableCARDS, sold off a number of systems with retail CableCARD customers, or some other explanation. Whatever the reason, the undersigned wished to make

the record clear that the number of retail CableCARD subscribers using TiVo DVRs is **increasing** contrary to what NCTA's report might otherwise suggest.<sup>4</sup>

- Mention was also made about a recent blog that described continued obstacles for consumers using CableCARD devices (including tuning adapters) along with observations on the NCTA report. <http://www.zatznotfunny.com/2012-02/the-best-worst-cable-companies-for-tivo-owners/>
- Finally, the undersigned reiterated comments previously made in Docket 97-80 that the overwhelming majority of pay television content is available **only** through multichannel video programming providers and that CableCARD currently is the **only** way for competitive device manufacturers to access this content. Consequently, until a viable successor to CableCARD exists, the Commission must ensure that CableCARD rules are strictly enforced and not allow Commission policy underlying CableCARD to be undermined.

This letter is being provided to your office in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,



Matthew Zinn  
Senior Vice President, General Counsel, Secretary, and Chief Privacy Officer

cc:  
Michelle Carey  
Nancy Murphy  
Brendan Murray

Christy Adams  
Chief Executive Officer  
Adams Cable Equipment  
15560 West 100th Terrace  
Lenexa, KS 66219

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<sup>4</sup> Indeed, ACE tries to use the NCTA report as justification for its waiver citing the "dwindling base" of retail CableCARD devices. ACE February 3, 2012 Ex Parte. ACE's waiver certainly is not the proper context for debating the merits of the integration ban.

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Paul B. Hudson  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue NW  
Washington, D.C. 20006